

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

|                         |   |                        |
|-------------------------|---|------------------------|
| HECTOR OMAR SANTOYO,    | ) |                        |
|                         | ) |                        |
| Petitioner,             | ) |                        |
|                         | ) |                        |
| v.                      | ) | Case No. CIV-05-1253-L |
|                         | ) |                        |
| JUSTIN JONES, Director, | ) |                        |
|                         | ) |                        |
| Respondent.             | ) |                        |

**ORDER**

This matter is before the court for review of the Report and Recommendation entered by United States Magistrate Judge Gary M. Purcell on December 28, 2005. Petitioner, a state prisoner appearing *pro se*, brings this action pursuant to 28 U.S.C. §2254 seeking a writ of habeas corpus. The Magistrate Judge found, in part, that the petition should be dismissed without prejudice for failure to exhaust state court remedies. The Magistrate Judge determined that the claims alleged in counts five through eight have not been exhausted "as an appeal of the district court's denial of his post-conviction application is now pending before the [Oklahoma Court of Criminal Appeals]." Any written objections to the Report and Recommendation were to be filed by January 17, 2006.

The court file reflects that no party filed a written objection to the Magistrate's Report and Recommendation within the time limit provided. However, on January 24, 2006, petitioner filed a Notice to the Court, attaching a

copy of the Order Affirming Denial of Post-Conviction Relief filed in the Oklahoma Court of Criminal Appeals on January 13, 2006. Later, on February 21, 2006, petitioner filed an "Objection to Magistrate's R&R" which incorporates by reference his earlier Notice to the Court. Petitioner contends that the Report and Recommendation should be rejected since he "has now exhausted state court remedies for all claims raised in the instant petition, thus rendering that issue moot."

Upon *de novo* review, and based upon the unique circumstances presented, the court finds that the matter should be recommitted to the Magistrate Judge for an evaluation of petitioner's claim that he has now exhausted his state court remedies. Therefore, the Report and Recommendation of the Magistrate Judge will not be adopted and the petition will not be dismissed without prejudice at this time. **This matter is recommitted to the Magistrate Judge for further proceedings in accordance with the original order of referral.**

It is so ordered this 2nd day of March, 2006.

  
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TIM LEONARD  
United States District Judge